

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ARLONZO JACKSON BANKS,

Petitioner,

v.

JEFF LYNCH, Warden,

Respondent.

No. 2:20-cv-0827 TLN KJN P

FINDINGS AND RECOMMENDATIONS

I. Introduction

Petitioner is a state prisoner, proceeding through counsel, with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. This proceeding was referred to this court by Local Rule 302 under 28 U.S.C. § 636(b)(1). Respondent moves to dismiss this action as premature because petitioner's sentence is pending in the Sacramento County Superior Court on remand from the California Court of Appeal. Petitioner opposes the motion or, in the alternative, seeks to stay the federal petition pending state court proceedings. For the reasons stated below, respondent's motion should be granted, petitioner's motion for stay should be denied, and this action should be dismissed without prejudice.

II. Motion to Dismiss

Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a petition if it "plainly appears from the face of the petition and any exhibits annexed to it that the

1 petitioner is not entitled to relief in the district court. . . .” Id.; see also White v. Lewis, 874 F.2d  
2 599, 602-03 (9th Cir. 1989) (Rule 4 permits meritorious motions to dismiss). In addition, the  
3 Advisory Committee Notes to Rule 8 of the Rules Governing Section 2254 Cases indicate that the  
4 court may dismiss a petition for writ of habeas corpus: on its own motion under Rule 4; pursuant  
5 to the respondent’s motion to dismiss; or after an answer to the petition has been filed. See, e.g.,  
6 Miles v. Schwarzenegger, No. 2:07-cv-1360 LKK EFB, 2008 WL 3244143, at \*1 (E.D. Cal. Aug.  
7 7, 2008) (dismissing habeas petition pursuant to respondent’s motion to dismiss for failure to  
8 state a claim). Accordingly, the court reviews respondent’s motion to dismiss pursuant to its  
9 authority under Rule 4.

10       A. Background

11       Petitioner commenced this action on April 22, 2020. He challenges his May 15, 2014  
12 conviction of first degree murder. (ECF No. 1 at 12.) The jury also found true that petitioner  
13 personally used and discharged a firearm. The jury did not find true the gang enhancement and  
14 allegation that petitioner personally discharged a firearm causing death. (Id.) Petitioner was  
15 sentenced to an indeterminate sentence of 25 years to life, plus a determinate term of 20 years in  
16 state prison. (ECF No. 1 at 13, 8 at 2.)

17       Petitioner appealed his sentence. On October 17, 2018, the California Court of Appeal  
18 affirmed the conviction. (ECF No. 1 at 13.) However, the state appellate court remanded  
19 petitioner’s case pursuant to California Senate Bill 620, holding:

20           As to Alvarez, Banks and Williams, the matter is remanded for the  
21 trial court to exercise its discretion under section 12022.53,  
22 subdivision (h), whether to strike any of the section 12022.53  
enhancements . . . .

23           In all other respects, the judgment is affirmed.

24 (ECF No. 13 at 2, citing ECF No. 1-1 at 51.)

25           The California Supreme Court denied review on January 23, 2019. (ECF No. 1 at 13.)

26           The Third District Court of Appeal issued the remittitur on January 31, 2019. (ECF No.  
27 13 at 2.) The Sacramento County Superior Court docket reflects petitioner’s case, People v.  
28 Banks, No. 11F02295, was on calendar for “remittitur” on March 21, 2019, and May 10, 2019,

1 for “Further proceedings” on November 5, 2019, and March 28, 2020, and at the time petitioner  
2 filed his opposition was set for “Remittitur” on October 23, 2020.<sup>1</sup> (ECF No. 13 at 2, 9-10.)  
3 Subsequently, on September 29, 2020, further proceedings were held, and the “Remittitur” was  
4 continued to January 8, 2021. See No. 11F02295 (court docket viewed November 3, 2020).

5 On August 12, 2019, petitioner filed a petition for writ of habeas corpus in the Sacramento  
6 County Superior Court based on new evidence. On December 4, 2019, the superior court issued  
7 an order denying the petition, and did not issue an order to show cause. (ECF No. 1 at 13.)

8 On February 3, 2020, petitioner filed a petition for writ of habeas corpus in the Third  
9 District Court of Appeal. (ECF No. 1 at 13.) On February 14, 2020, the state appellate court  
10 denied the petition.

11 On February 20, 2020, petitioner filed a petition for review in the California Supreme  
12 Court. (ECF No. 1 at 13.) On February 24, 2020, the Court asked the attorney general to file an  
13 answer. Following briefing, the California Supreme Court denied the petition. (ECF No. 1 at  
14.)

15       B. Discussion

16       It is premature for this court to review petitioner’s collateral attack on his conviction  
17 before the state court has had the opportunity to adjudicate the application of California Senate  
18 Bill 620. See Younger v. Harris, 401 U.S. 37 (1971). Under Younger, federal courts may not  
19 enjoin pending state criminal proceedings except under extraordinary circumstances. Id. at 49,  
20 53. Younger abstention prevents a court from exercising jurisdiction when three criteria are met:  
21 1) there are ongoing state judicial proceedings; 2) an important state interest is involved; and  
22 3) there is an adequate opportunity to raise the federal question at issue in the state proceedings.  
23 H.C. ex rel. Gordon v. Koppel, 203 F.3d 610, 613 (9th Cir. 2000).

24  
25       <sup>1</sup> The court may take judicial notice of facts that are “not subject to reasonable dispute  
26 because it . . . can be accurately and readily determined from sources whose accuracy cannot  
27 reasonably be questioned,” Fed. R. Evid. 201(b), including undisputed information posted on  
28 official websites. Daniels-Hall v. National Education Association, 629 F.3d 992, 999 (9th Cir.  
2010). It is appropriate to take judicial notice of the docket sheet of a California court. White v.  
Martel, 601 F.3d 882, 885 (9th Cir. 2010). The address of the official website of the California  
state courts is www.courts.ca.gov.

1           All three Younger criteria are satisfied here. First, petitioner filed this action while his  
 2 sentencing claims are pending in the Sacramento County Superior Court, thus state court  
 3 proceedings were ongoing at the time the instant petition was filed. “Second, the resentencing  
 4 proceeding implicates an important state interest in enforcing criminal laws without federal  
 5 interference.” Duke v. Gastelo, 2020 WL 4341595, at \*4 (C.D. Cal. June 24, 2020), adopted,  
 6 2020 WL 4339889 (C.D. Cal. July 28, 2020). Third, the California state courts provide an  
 7 adequate forum in which petitioner may pursue his claims. See Pennzoil Co. v. Texaco, Inc., 481  
 8 U.S. 1, 15 (1987) (“[A] federal court should assume that state procedures will afford an adequate  
 9 remedy, in the absence of unambiguous authority to the contrary.”). When the state proceedings  
 10 have concluded and his conviction becomes final, petitioner may seek federal habeas relief.  
 11 Fellows v. Matteson, 2020 WL 4805022 (C.D. Cal. May 18, 2020) (prisoner “may seek federal  
 12 habeas relief after his California state criminal proceedings, including his pending SB 620 motion  
 13 in the California Court of Appeal, have concluded with a final judgment of conviction.”). Thus,  
 14 the undersigned cannot find that extraordinary circumstances warrant intervention by this court.

15           Finally, “courts in the Ninth Circuit have abstained under Younger when a habeas  
 16 petitioner’s state resentencing appeal is pending.” Duke, 2020 WL 4341595, at \*4; Sauceda v.  
 17 Sherman, 2020 WL 2510639, at \*4 (C.D. Cal. Feb. 7, 2020) (recommending dismissal of a  
 18 federal habeas petition due to pending state appeal for resentencing under Cal. P.C. § 1170.95);  
 19 Phillips v. Neuschmid, 2019 WL 6312573, at \*3 (C.D. Cal. Oct. 18, 2019) (“courts implicitly find  
 20 that granting federal habeas corpus relief would have the practical effect of enjoining or  
 21 interfering with the ongoing state judicial proceeding, even where the state proceeding is limited  
 22 to sentencing;” recommending dismissal of habeas petition due to pending state appeal for  
 23 resentencing); adopted, 2019 WL 6310269 (C.D. Cal. Nov. 22, 2019) (collecting cases).<sup>2</sup>

24           Accordingly, the undersigned recommends that this action be dismissed, without  
 25 prejudice, as premature. See U.S.C. § 2254(a).

---

26           <sup>2</sup> But see Rivas v. Sherman, 2020 WL 5802378, at \*2-4 (C.D. Cal. July 30, 2020) (finding  
 27 Younger abstention not required because SB 620 resentencing will not give rise to any federal  
 28 constitutional claims that could be litigated in either forum, state or federal, citing Central District  
 cases, “this case and the SB 620 resentencing to be held are wholly distinct and do not overlap in  
 any respect.”)

1        III. Motion for Stay

2              In the alternative, petitioner seeks stay and abeyance under Kelly v. Small, 315 F.3d 1063  
 3 (9th Cir. 2003), rather than dismissal of this action.<sup>3</sup> (ECF No. 13 at 6.) Petitioner argues that a  
 4 stay, rather than outright dismissal, would serve the interest of judicial economy and prevent  
 5 petitioner from having to refile a duplicate petition and prevent the court from having to again  
 6 issue an order to show cause to respondent. (ECF No. 13 at 6.) Respondent counters that  
 7 although petitioner has exhausted his federal claims in state court, his conviction is not yet final,  
 8 requiring abstention, and because the statute of limitations period has not yet begun to run, stay  
 9 and abeyance is inappropriate. (ECF No. 14 at 2-3.)

10             The undersigned is not persuaded that a Kelly stay is available under these circumstances,  
 11 and finds that a stay is not appropriate. Under the Anti-terrorism and Effective Death Penalty Act  
 12 (“AEDPA”), a one-year limitations period for seeking federal habeas relief begins to run from  
 13 “the date on which the judgment became final by the conclusion of direct review or the expiration  
 14 of the time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A). “Final judgment in a criminal  
 15 case means sentence. The sentence is the judgment.” Burton v. Stewart, 549 U.S. 147, 156  
 16 (2007), quoting Berman v. United States, 302 U.S. 211, 212 (1937). Until petitioner’s judgment  
 17 and sentence is rendered final “by conclusion of direct review or by the expiration of the time for  
 18 seeking such review,” AEDPA’s one-year statute of limitations period will not begin to run. See  
 19 Burton, 549 U.S. at 156-57. Here, the statute of limitations period for the filing of a federal  
 20 habeas petition has not begun to run; thus, it is inappropriate to grant a stay and abeyance.  
 21 Bennett v. Fisher, 2015 WL 6523689, at \*1 (E.D. Cal. Oct. 27, 2015) (finding stay inappropriate  
 22 where limitations period has not begun to run, dismissing petition as premature); Henderson v.  
 23 Martel, 2010 WL 2179913, at \*6-7 (E.D. Cal. May 26, 2010) (denying renewed motion for a stay  
 24 and abeyance as premature).

---

25             <sup>3</sup> The Kelly procedure involves three steps: “(1) petitioner amends his petition to delete any  
 26 unexhausted claims, (2) the court stays and holds in abeyance the amended, fully exhausted  
 27 petition, allowing petitioner the opportunity to proceed to state court to exhaust the deleted  
 28 claims, and (3) petitioner later amends his petition and re-attaches the newly-exhausted claims to  
 the original petition.” King v. Ryan, 564 F.3d 1133, 1135 (9th Cir. 2009), citing Kelly, 315 F.3d  
 at 1070-71. “[T]he Kelly procedure . . . is not premised upon a showing of good cause.” King,  
 564 F.3d at 1140.

1           Therefore, petitioner's motion for stay should be denied.

2           **III. Conclusion**

3           Accordingly, IT IS HEREBY RECOMMENDED that:

4           1. Respondent's motion to dismiss (ECF No. 8) be granted;  
5           2. Petitioner's motion for stay (ECF No. 13) be denied; and  
6           3. This action be dismissed without prejudice.

7           These findings and recommendations are submitted to the United States District Judge  
8 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
9 after being served with these findings and recommendations, any party may file written  
10 objections with the court and serve a copy on all parties. Such a document should be captioned  
11 "Objections to Magistrate Judge's Findings and Recommendations." If petitioner files objections,  
12 he shall also address whether a certificate of appealability should issue and, if so, why and as to  
13 which issues. A certificate of appealability may issue under 28 U.S.C. § 2253 "only if the  
14 applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C.  
15 § 2253(c)(3). Any response to the objections shall be served and filed within fourteen days after  
16 service of the objections. The parties are advised that failure to file objections within the  
17 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951  
18 F.2d 1153 (9th Cir. 1991).

19           Dated: November 4, 2020

20             
21           

---

  
22           KENDALL J. NEWMAN  
23           UNITED STATES MAGISTRATE JUDGE

24           /bank0827.mtd.younger.sty

25

26

27

28